

Guest commentary: Phil Isenberg muses on water, lawsuits, and the Fourth of July

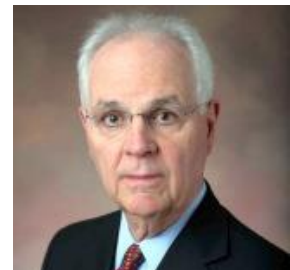
July 4, 2015 Maven Featured Articles



This year, I am soliciting special guest commentaries for the each holiday, loosely based on the theme of the day. On Easter, [John Kingsbury with the Mountain Counties Water Resources Association](#) talked about spring in our mountains and the importance of protecting our headwaters. On Memorial Day, [the Notebook](#) paused to remember Dorothy Green with a special commentary written by [Jovita Pajarillo](#). And now, on the Fourth of July, I asked Phil Isenberg, Vice Chair of the Delta Stewardship Council, to write today's guest commentary:

Maven:

You asked me to write something for the 4th of July for the Notebook. This was odd, since the only mention of water in the Declaration of Independence is by way of condemning the King of England for impressing American sailors to serve on British vessels at sea.



King George sure was a bad guy! The Declaration charges that he did not approve all of the laws we wanted. He delayed enforcing the laws we thought most important. He did not like 'large districts' of people forming their own governments (no 'big government?')

The King also wanted to stop immigration to our shores; we wanted more immigrants!! The King sent more tax agents out to collect our taxes. And then the serious stuff about foreign troops based in America, and boarded in our homes. (Did you know that during World War II the Brits had a clever line about Americans troops in England: “over paid, over sexed, and over here”?)

The clincher according to the Declaration of Independence was that the King ‘*plundered our seas, ravaged our coasts, burned our towns, and destroyed the lives of our people...*’

A struggle for an independent country is a lot more important, and dangerous, than our water fights, but the tone people use is all too familiar. Maybe American political culture demands inflamed rhetoric and predictions of imminent doom as a prior condition for doing anything at all. And maybe the way we talk about issues today has a lot to do with the way we became a nation.

When you get back from your holiday, I have some suggestions of things that might help everyone do a better job of solving our water problems. Start by continuing to cover the ‘big’ stories that catch the attention of the media: drought, high temperatures, what happened to BDCP?, and be sure to highlight outrageous comments by folks who object to reducing their water use. Finally, keep up the good work itemizing our endless efforts to blame someone else for our collective water problems.

At the same time, you should think about some things that don't get as much coverage as they should, but will influence water and environmental policy for decades.

Try to get a handle on the large and growing number of lawsuits over water use.

- Water users who object to any cut in their supply sue the state and the feds to prevent reductions, and challenge the authority of the State Water Resources Control to do much of anything.
- Watch for increasing fight among elements of the agricultural community in the Central Valley and statewide; ‘senior vs junior’ water rights litigation is only one example.
- Environmental litigation forcing increased attention on drought-impacted fish and habitat will increase

Whatever the merits of any litigation, one thing is clear: lawsuits are based on a traditional “me and mine first” approach. .

Unfortunately, litigation is dispersed through many courts, and there is virtually no place you can get a overview of pending litigation. Save for a few smart law professors and researchers, no one else is going to be able to know just how the cases are breaking, or when the Public Trust Doctrine, or

California's Constitution Article X, Section 2 about 'reasonable' use of water and 'no wasting' comes into play.

Just as important, no one is thinking about how the Obama and Brown Administrations might use the settlement of law suits to achieve better water and environmental purposes. For a good example of how litigation policy-making might work, see *Williams v. State of California*, the SF-based litigation demanding the State provide additional funds for sufficient textbooks, safe school buildings, and well trained teachers in low-performing urban and rural schools.

The case was eventually settled by the Schwarzenegger Administration in 2004, who agreed to allocate \$1 billion to address the problems. The categories of spending were specified by the settlement agreement but legislation had to approve spending the money. Ultimately that happened. Public Advocate website, <http://www.publicadvocates.org/williams-v-california>, and the California State Department of Education website, <http://www.cde.ca.gov/eo/ce/wc/wmslawsuit.asp>.

If Maven's Notebook does not take a crack at this, who will?

Pay attention to the operations and maintenance of the State Water Project (and the Central Valley Project too), particularly as it relates to land subsidence. Everyone who works on California water issues knows that land subsidence in the Central Valley is a very big problem. Subsidence is currently causing big problems by damaging the canals and related facilities that move water for the State Water Project, and a lot of money needs to be spent to fix the problems.

Subsidence, mostly caused by overuse of groundwater, can result in permanent underground water storage capacity. Ironically, much of our current water debate is focused on improving the existing water conveyance system in the Delta, and building new surface and underground water storage projects north and south That's fine, but we can build water tunnels endlessly, create a bunch of new, very costly dams and reservoirs and unless the SWP is maintained and operated at its most efficient level, none of the infrastructure works very well.

The question is who pays for the repairs, and how fast do they happen? The State Water Contractors are legally obligated to pay for operation and maintenance of the SWP, but have spent a lot for Delta-related studies including the Governor's Water Fix, and for obvious reasons are not anxious to accelerate payments to make the current water system operate at full efficiency.

Expect to see the State pushing for additional funds for operations and maintenance, and also look for litigation over allocation of costs for subsidence repairs, with urban Southern California arguing that

they did not cause the Central Valley subsidence problems and should not have to pay a disproportionate amount to fix them.

The place this will likely play out is the ongoing negotiations for extension of the SWP contracts, <http://www.water.ca.gov/swpao/watercontractextension/>.

Pay attention to the role of science in all new water transfer facilities, and storage projects. For the past 50 years, public officials have increasingly asserted that ‘science’ — currently “best available science”, and “[adaptive management](#)” — are key to major public works project. In 2012, Governor Jerry Brown and federal officials announced that the Bay Delta Conservation Plan “*Science will now guide how to best restore the ecosystem and how much water can be exported.*”

The fact is that no one is very clear about how science is supposed to be involved in public works projects. Are scientists only advisory, or do their opinions control action? Should independent scientists be voting members of any operating system for a capital involvement project? Who pays for scientific review and how much?

At the core of this issue is a reluctance of water system operators to join water reliability actions to ecosystem improvements. The 2009 Delta Reform Act, which adopted the [Coequal Goals](#) as formal state policy solved that, but laws do not enforce themselves. It takes years of hard work, changes in formal structure and authority of government agencies, and lot of money to achieve the right results.

If water system operators want to avoid litigation over their decisions, a big part of the solution is involving independent scientists in the decision-making.

Jerry Brown and the need for adult supervision

It is hard to overstate the importance of the Governor in our water debates. He confounds and delights at the same time, speaking both in Vulgate and Latin.

He remains the most powerful advocate of new water conveyance tunnels, while guaranteeing California has a state groundwater regulation law in place after 100+ years without one). He remembers the 1976-77 drought, during his first term as Governor, and thus supports (reluctantly) the imposition of mandatory rationing. The Administration’s backing for the State Water Resource Control Board in their efforts to balance the demands for a limited supply of water is remarkable.

At the same time, Governor Brown actually means it when he says ‘we have to live within our means’. He usually applies this to government spending and revenue, but it is true in water issues as

well. The Governor reminds everyone that no one can make it rain. Which helps explain why demands for water have to match the supply of water, not the other way around.

In sum, he is the adult in the room of California water policy. And we need more adults in that room. Which is why you should cover him more extensively.

I do not want to overstate the role of adult supervision. Water issues are sticky, and solutions are illusive and costly. One reason is due to human nature and the culture of water institutions.

In the late 1980s, as a relatively new legislator, I attended a dinner in San Francisco sponsored by Senator Bill Bradley (D-NJ), Chair of the United States Senate Energy & Natural Resources Committee, with water managers, environmentalists and even some legislators. The focus was on California water problems, with emphasis on the Mono Lake dispute.

The City of Los Angeles had been fighting for years to protect its export of water from the Mono Lake region. Major court decisions, then decisions of the State Water Resources Control Board, and eventually federal and state legislation (my own effort of allocating \$60 million to Los Angeles conservation efforts if they settled the Mono Lake litigation included) — all made it clear that the City was in big trouble.

Senator Bradley prodded me and Mike Gage, then Director of the LA Department of Water and Power to talk about Mono Lake, and we did. I kept saying, “Mike, take the money and settle the lawsuit”. Mike, a former Democratic state legislator from Northern California, and a solid environmentalist, eventually exploded and said something that has stuck with me:

“God damn it, I can lose it for my folks, but I can’t give it away”

Even good, smart people find it almost impossible to change long-held positions. Mike was the head of a big public water agency and his people had spent their entire careers battling about Mono Lake. Most of his professional staff rejected compromise. So he did too. Eventually, the LA City Council and Mayor agreed to a settlement

Water policy debates are often like that — a lot of smart people who know change is inevitable, but can’t bring themselves to say so publicly, or fear to tell their organization (members, ratepayers, elected board members, voters) that it’s time to give up the fight.

“Americans will always do the right thing — After Exhausting All the Alternatives”, is a quotation often —and wrongfully — attributed to Winston Churchill, Prime Minister of Great Britain, who

allegedly was asked: When might the United States join us in fighting World War II? It is an apt description of our current water battles.

The water supply in California is considerable, but scarce in time of drought. The water supply is increasingly erratic mostly caused by climate change, and we have complicated the problem by seeming to promise water to everyone for every purpose. The obvious solution is that everyone has to use less water to get us through a drought with the smallest amount of pain.

Neither America or California always does the right thing. I am convinced, however, that we get it right more often than not, and after a long time.

We are currently trying to balance our allocation of natural resources, making them available as much as possible for human purposes and, environmental uses was well. Like the American Revolution, it may work or not, only time will tell.

Happy birthday, America!



Note: The views and opinions expressed in guest commentaries are those of the authors and do not necessarily reflect the official policy or position of Maven or Maven's Notebook.